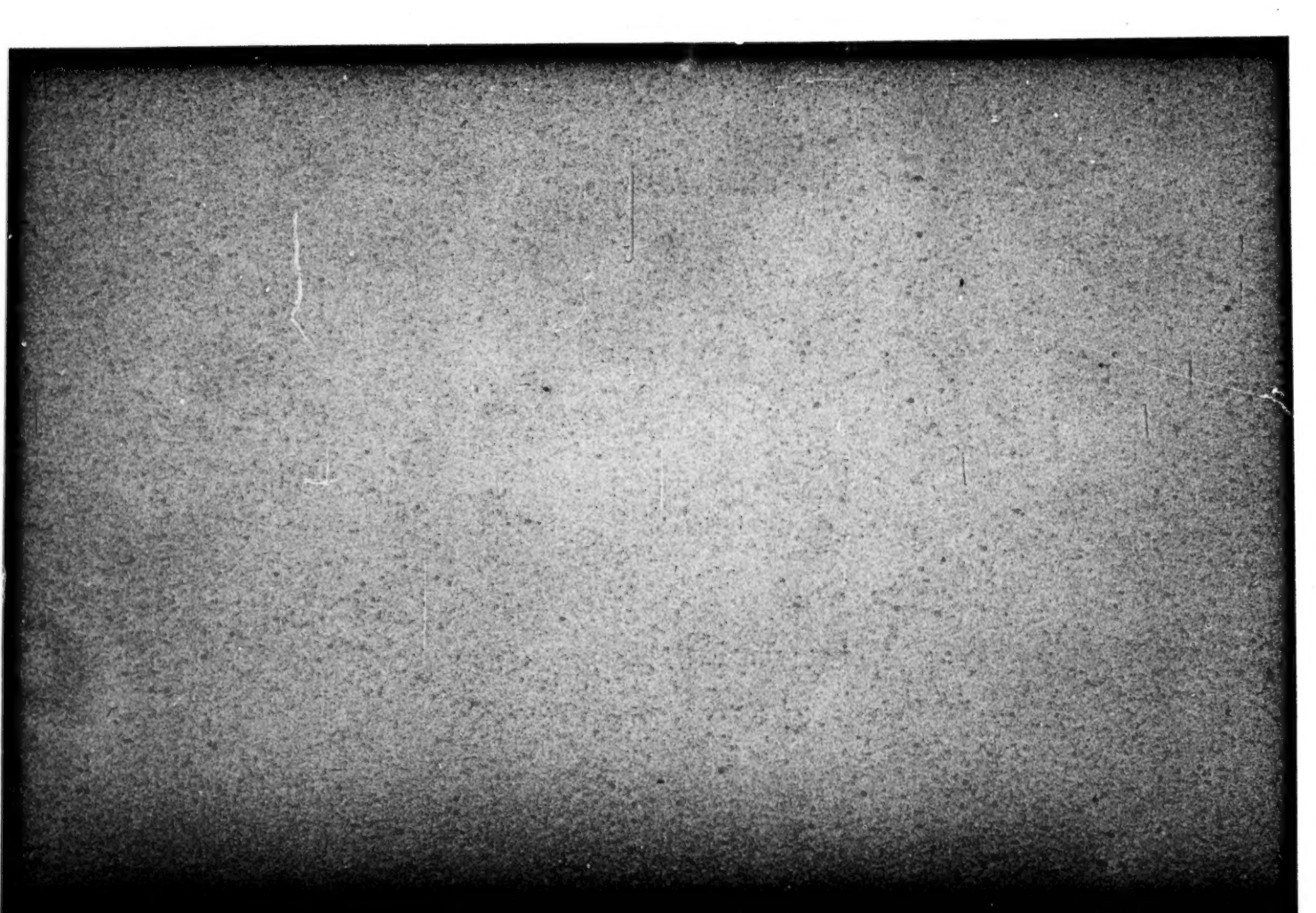

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA, *Petitioner,*

v.

MARTIN DEWALT MAZURIE, ET AL., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION IN SUPPORT OF (A) THE MOTION OF THE UNITED STATES FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME AND (B) THE PETITION FOR CERTIORARI

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Tribal Chairmen's Association is an unincorporated, non-profit organization of all duly constituted chairmen, presidents, governors and chiefs of federally recognized Indian tribes, and the presi-

dents of the twelve Alaska Regional Corporations established under the Alaska Native Claims Settlement Act. The Association and all of its members are vitally interested in preserving and protecting the sovereignty of Indian tribes which would be significantly undercut if the decision of the Court of Appeals for the Tenth Circuit is allowed to stand.

The decision below would not only destroy the Congressional scheme for controlling liquor sales within Indian reservations, it would also have far-reaching, equally destructive, effects on all areas subject to tribal regulatory control. The petition of the United States and the Amicus Brief of the Wind River Tribes emphasize the liquor control problem while the Association's Amicus Brief deals with the broader implications of the Tenth Circuit's decision.

Through what the United States admits was an inadvertent error, a petition for a writ of certiorari was not timely filed. The National Tribal Chairmen's Association asks leave to file the attached Brief Amicus Curiae to call attention to all of the disastrous consequences of the Tenth Circuit's decision and to pray that the government's inadvertent error not penalize the nation's Indian tribes by precluding review and reversal by this Court.

Respectfully submitted,

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Of Counsel
Native American Rights Fund

January, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA, *Petitioner,*

v.

MARTIN DEWALT MAZURIE, ET AL., *Respondent.*

BRIEF OF AMICUS CURIAE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

The Tenth Circuit Court of Appeals held that a specific Congressional delegation of authority to Indian tribes to control liquor sales within their respective reservations is unconstitutional as applied to non-Indians conducting their business on fee patented land within the exterior boundaries of their reservations. This decision is contrary to established authority, as shown by the Government's Petition at pages 15-16. It also creates dangerous no-man's areas within Indian reservations immune from the police power and regulatory jurisdiction of any governmental authority and wreaks havoc with tribal plans for orderly and controlled economic development.

The effect of the decision below cannot be limited to tribal authority over one particular kind of business activity, i.e. liquor sales. If tribes do not have authority to license liquor sales pursuant to a specific Congressional delegation, neither can they zone, or apply building codes, or enforce health, sanitation or environmental requirements, or condemn land, or license utilities, or perform any of the other myriad essential functions of modern government, whether pursuant to their inherent or residual tribal sovereignty,[1] or a specific Congressional delegation of authority.

This Court has noted the difficulties attendent upon "impractical patterns of checkerboard jurisdiction" within Indian reservations and has struggled hard to prevent that result whenever possible. *Seymour* v. *Superintendent*, 368 U.S. 351 at 358 (1962). See also *Mattz* v. *Arnett*, 412 U.S. 481 (1973). If, as Amicus believes, and this Court [2] and the New Mexico Supreme Court [3] have held, states and their political subdivisions are without jurisdiction to regulate the business

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[1] See, *e.g.*, Cohen, *Handbook of Indian Law* 122 (1944):

> Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* . . . The statutes of Congress, then, must be examined to determine the limitations on tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty. [emphasis in original]

[2] *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965).

[3] *Sangre De Cristo Dev. Corp., Inc.* v. *City of Santa Fe*, 84 N.M. 343, 503 P.2d 323 (1972), *cert. denied*, 411 U.S. 938 (1973).

activities of non-Indians operating on non-Indian lands within Indian reservations,[4] the decision of the court below means that such activities are immune from any governmental police power regulation whatsoever.

This result is totally out of keeping with the requirements of today's industrialized and highly interrelated society. It is far worse than checkerboard jurisdiction which merely makes the exercise of governmental control more difficult, but, at least in theory, not impossible.

The decision below will also prevent tribes from planning for the orderly and controlled economic development of their reservations. Planning obviously requires centralized control over a fixed geographical area. If the ability to exercise that control depends not upon the location of the land, but upon such factors as whether the land or business are owned by Indians or non-Indians, intelligent planning simply cannot be done. What is within tribal jurisdiction today may be gone tomorrow. Those seeking to avoid regulation and control would have a field day. The enormous gaps in

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[4] See also *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164 (1973), decided after *Sangre De Cristo*, in which this Court's previous decisions regarding the limits of permissible state jurisdiction on Indian reservations were clarified and their basis defined more precisely. In particular, footnote 6 of the *McClanahan* opinion states explicitly the tribal sovereignty rationale behind the Supreme Court's earlier *Warren Trading Post* holding:

> The Court invalidated Arizona's tax in part because "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra* at 690.

regulatory authority would, in many instances, preclude any effective regulation. At a minimum, Indians would be restricted while, ironically, non-Indians would enjoy unlimited freedom from governmental control within reservations that cannot be achieved in non-Indian communities outside reservations. Among many other evils, non-Indians would thereby gain unfair competitive advantages.

The statutory scheme pursuant to which the defendants were prosecuted recognized these regulatory and jurisdictional realities by delegating authority to one entity, the Indian tribe that governs the reservation, to license anyone, Indian or non-Indian,[5] who wants to sell liquor within Indian Country, whether located on patented or trust lands.[6] By holding this delegation unconstitutional, the court below has rendered Indian reservations largely uncontrollable and ungovernable. The motion and petition of the United States must be granted to prevent this extremely serious, improper and unjust result.

Respectfully submitted,

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January, 1974

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[5] Defendants make no claim of discriminatory enforcement.

[6] There is one sensible exception: sales on fee patented lands in non-Indian communities.